M.D.V.L., INC., d/b/a Denny's Transmission Service *and* Ronald Miller *and* Dale Weightman. Cases 28–CA–140217 and 28–CA–140237

May 11, 2016

DECISION AND ORDER

BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA AND MCFERRAN

On September 10, 2015, Administrative Law Judge Donna N. Dawson issued the attached decision. The Respondent filed exceptions and a supporting brief. The Charging Parties filed an answering brief, and the Respondent filed a reply brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings,[1] findings,[2] and conclusions, to modify the recommended remedy, and to adopt the recommended Order as modified.[3]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge as modified below and orders that the Respondent, M.D.V.L., Inc., d/b/a Denny's Transmission Service, Phoenix, Arizona, its officers, agents, successors, and assigns, shall take the action set forth in the Order as modified.

1. Substitute the following for paragraph 2(c).

"(c) Compensate Dale Weightman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file with the Regional Director for Region 28 within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years."

2. Substitute the attached notice for that of the administrative law judge.

Dated, Washington, D.C. May 11, 2016

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

[1] The Respondent excepts to the judge's decision not to accept or consider the attachments to its posthearing brief to the judge, correctly asserting that the judge erred in finding that it had not sought to reopen the record to admit these documents. Because we agree with the judge's finding that the attachments are not relevant, the judge's failure to consider them was harmless. Accordingly, we find that the Respondent's exception is without merit.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

We affirm the judge's finding that the Respondent violated Sec. 8(a)(1) of the Act by discharging Dale Weightman. In doing so, we reject the Respondent's argument that Ronald Miller's demand letter for unpaid wages was a purely personal claim and that, therefore, Weightman's conduct relating to that letter did not constitute protected concerted activity. Even assuming, arguendo, that Miller's letter was a personal claim, "[t]he Board has consistently held that concerted employee action, when invoked peaceably, to further an employment claim . . . albeit personal in nature, remains within the protective mantle of Section 7 of the Act." *Portola Packaging, Inc.*, 361 NLRB No. 147, slip op. at 3 & fn. 11 (2014) (internal quotation marks omitted). Additionally, in finding that Weightman engaged in protected concerted activity by discussing safety concerns with his co-employees and the Respondent, we rely on *St. Bernard Hospital & Health Care Center*, 360 NLRB No. 12, slip op. at 9 (2013), rather than *E. I. DuPont De Nemours & Co., Inc.*, 257 NLRB 139 (1981), or *Diagnostic Center Hospital Corp.*, 228 NLRB 1215 (1977), cited by the judge. Further, we note that our finding that the General Counsel met his burden of proving that animus against protected concerted activity motivated the discharge is not dependent on the contemporaneous Sec. 8(a)(1) threats by the Respondent. The other factors cited by the judge are clearly sufficient by themselves to establish animus.

We also affirm the judge's finding that the Respondent's owner, Michael Van Loo, threatened Weightman in violation of Sec. 8(a)(1). Van Loo told Weightman that he could have fired Miller but did not explain why he could have done so. The judge inferred that a reasonable employee would have linked the threat to Miller's protected concerted activity. The record supports her inference: Miller regularly discussed the issue of wages with his coemployees and management, and the threat occurred while Van Loo was arguing with Weightman about Miller's demand letter, which concerned that very subject. Conversely, there is no record evidence to support the Respondent's contention that employees would have interpreted Van Loo's threat to mean that he could have fired Miller because Miller was looking for other jobs.

Finally, we reject the Respondent's overarching argument that Miller was not an "employee" for purposes of the Act after he voluntarily resigned. The Board has held that the term "employee" means "members of the working class generally, including former employees of a particular employer." *Little Rock Crate & Basket Co.*, 227 NLRB 1406, 1406 (1977) (internal quotation marks omitted); see also *L. D. Brinkman Southeast*, 261 NLRB 204, 204 fn. 3, 210 (1982).

[3] In accordance with our decision in *AdvoServ of New Jersey, Inc.*, 363 NLRB No. 143 (2016), we shall modify the judge's recommended tax compensation and Social Security reporting remedy. We shall modify the judge's recommended Order and substitute a new notice to reflect this remedial change.

Lauren McFerran, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees in retaliation for joining with or otherwise supporting other employees in discussing overtime or other pay, safety concerns, or other terms and conditions of employment.

WE WILL NOT make threatening or coercive statements to former employees or current employees telling them that they or other employees could or should have been (or should be) terminated for engaging in protected concerted activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Dale Weightman full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dale Weightman whole for any loss of earnings or other benefits resulting from his discharge, less any net interim earnings, plus interest.

WE WILL compensate Dale Weightman for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file with the Regional Director for Region 28, within 21 days of the date the amount of backpay is fixed, either by agreement or Board order, a report allocating the backpay award to the appropriate calendar years.

WE WILL, within 14 days from the date of the Board's Order, remove from our files all unlawful documentation of or references to, if any, Dale Weightman's discharge on July 8, 2014; and, within 3 days thereafter, notify him in writing that this has been done and that the documentation and discharge will not be used against him in any way.

M.D.V.L., INC., D/B/A DENNY'S TRANSMISSION SERVICE

The Board's decision can be found at www.nlrb.gov/case/28-CA-140217 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.

Christopher J. Doyle, Esq. and *Sara Demirok, Esq.*, for the General Counsel.
Ravi Patel, Esq., for the Charging Parties.

DECISION

STATEMENT OF THE CASE

DONNA N. DAWSON, Administrative Law Judge. This case was tried in Phoenix, Arizona, on April 7 and 8, 2015. Both Charging Parties, Ronald Miller (Miller) and Dale Weightman (Weightman) filed their charges on November 4, 2014.[1] A complaint issued on December 30, 2014, consolidating these charges and alleging that M.D.V.L., Inc., d/b/a Denny's Transmission Service (Respondent/Denny's Transmission) violated Section 8(a)(1) of the National Labor Relations Act (the Act) by terminating the Charging Parties for engaging in protected concerted activities and by telling employees that they should have been fired for engaging in protected concerted activities. During the trial, I granted the General Counsel's request to amend the complaint.[2] Respondent filed an answer, supple-

[1] All dates are in 2014 unless otherwise indicated.

[2] I granted the General Counsel's motion to amend the complaint (over Respondent's partial objection) as follows: to expand the time period for when alleged concerted activity took place to the middle of 2012 through about July 8, 2014 (par. 4(a)); to change the date that Respondent allegedly terminated Charging Party Miller from May 29 to May 30, 2014 (par. 4(b)); to change the date that Respondent's owner

mented by amendment during the hearing, denying the essential allegations in the complaint.[3]

On the entire record, including testimony of the witnesses, and my observation of their demeanor, and after considering the briefs filed by the General Counsel and the Respondent, I make the following[4]

FINDINGS OF FACT

I. JURISDICTION

Respondent, an Arizona corporation with offices and places of business in Phoenix, Arizona, provides service and repair of motor vehicle transmissions. Respondent admits, and I find, that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

Respondent also admits and I find that at all times material, Michael Van Loo (Van Loo), Respondent's owner, and Shawn Jeffrey Harris (Harris) and Dennis Van Loo (Dennis), Respondent's shop managers, have been supervisors and agents within the meaning of Section 2(11) and (13) of the Act.

II. STATEMENT OF FACTS

A. Overview of Respondent's Operations

1. Services provided and employees

At all material times in this case, Respondent has operated two Denny's Transmission Service shops in Phoenix, Arizona. The one located on South Central Avenue is referred to as the south shop, and is the facility central to the allegations in this case. The other is located on the north side of Phoenix and referred to as the north shop. Van Loo maintains his office in the south shop where he has at all material times shared office space with his secretary/receptionist/bookkeeper, Rhonda Tellez (Tellez), and a shop manager. Tellez' duties include keeping track of employees' time, attendance, and vacation schedules; writing and sometimes distributing payroll checks to the employees; and performing various other bookkeeping, secretarial, and receptionist work for Respondent's shops. Harris managed the south shop in 2013 and 2014.[5] Prior to that, Van Loo's son, Dennis, managed the south shop. Since early 2013, he has managed the north shop, but returns to the south shop each Friday to pick up paychecks for his employees.

Respondent employs transmission installers and transmission rebuilders. The installers (also referred to as R and R or removal and reinstaller technicians) remove transmissions so that the rebuilders can evaluate them and repair/rebuild them if necessary. Once that work is completed and inspected by Van Loo and/or the shop manager, the technicians reinstall the transmissions. For relevant times, Miller and Leo Gallegos (Gallegos) were installers and Weightman and Damian Berdusco (Berdusco) were rebuilders in Respondent's south shop. (Tr. 286–287.)

2. Wages and vacation time

Respondent pays its installers and rebuilders every Friday for work performed the preceding Friday through Thursday. For all times material to this case, Respondent admittedly paid these employees part of their week's pay by check, but the remainder in cash (i.e., under the table). Respondent did not rebut testimony that it failed to pay its installers and rebuilders overtime who normally worked 42.5 hours a week (8.5 hours each day), but sometimes docked their pay if they were late to work or took time (non-vacation) off. Nor did Respondent deny that it never paid its two installers, Miller and Gallegos, extra or overtime (over 40 hours) for working 4 to 5 hours every other Saturday.[6]

Respondent's employees automatically receive 5 days of vacation each year on their anniversary dates, regardless of when they were hired. Therefore, they take their vacations on or after that date. They are also paid for some non-work holidays, provided that they work the day before and after. However, if authorized, Respondent will pay employees for a holiday if they use their accrued vacation time on the day before and/or after the holiday. At first, Van Loo denied that he normally paid employees in advance for their vacation time, but later admitted that he usually paid employees "at the start of vacation." (Tr. 93–95.)

Respondent admittedly has no written policies and procedures for its practices regarding work hours, pay, and vacation. Instead, they are verbally communicated to employees when they are hired.

3. Hazardous working conditions

In order to remove and reinstall transmissions, the installers use various types of lifts to raise the vehicles. A number of the lifts are hydraulic lifts fueled with hydraulic fluid, also referred to as hydraulic oil. Other lifts, such as some of the drive on lifts, are electrically powered. There is little if any dispute that

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allegedly threatened employees by informing them on May 30 (and not June 1) that he should have fired them for engaging in past concerted activities (par. 4(c)); and to add a paragraph seeking an order requiring that as part of the remedy Respondent reimburse discriminatee(s) "for all search-for-work and work-related expenses regardless of whether the discriminatee(s) received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall backpay period." (GC Exhs. 1(l) and 1(e); Tr. 11–13, 18). Despite my allowing the amended complaint, there are no allegations that Respondent violated the Act before May 30, 2014, and evidence regarding Miller's alleged concerted activities beyond the 6-month limitation period will serve only as background information, and weighed accordingly.

[3] Respondent amended its answer by withdrawing its affirmative defense in par. 9 of the original answer, stating that Charging Party Weightman was a supervisor under Sec. 2(11) of the Act. (GC Exhs. 1(o), par. 10 and 1(g), par. 9; Tr. 14–17). Therefore, for purposes of this case, Weightman was not a supervisor as defined by the Act.

[4] Specific citations to the transcript, exhibits, and briefs are included where appropriate to aid review, and are not necessarily exclusive or exhaustive. Abbreviations used here are as follows: "Tr." for transcript; "GC Exh." for General Counsel's exhibit; "R. Exh." for Respondent's exhibit; "GC Br." for General Counsel's brief; and "R. Br." for Respondent's brief.

[5] According to Van Loo, Harris, resigned without prior notice about 2 weeks prior to the hearing, which will be discussed further in this decision.

[6] Miller worked every other Saturday without extra pay from 2011 until late 2012 when Respondent approved his request to stop working on Saturdays due to his child care issues. No one disputed that Gallegos continued to work on these Saturdays without pay. (Tr. 285–286.)

a number of these lifts, especially most of the hydraulic lifts, are old and have been in various stages of disrepair on and off for years. Some of the hydraulic lifts leak oil due to bad seals, resulting in the lifts either suddenly and rapidly ascending or descending with vehicles on and installers working underneath them. Similarly, one of the electrical lifts required installers to manually connect two bare wires in order to start it, which sometimes caused sparks to fly. (Tr. 189–191.) Although there was no evidence that these lift conditions caused any harm to Respondent's employees, there is no doubt that the employees believed that they were potentially hazardous for those who worked with or near them. Employees complained about these conditions to management and to each other. However, Van Loo expressed little or no concern about these conditions. Indeed, the lifts were rarely repaired.[7] Dennis, when at the south shop, listened to and was somewhat sympathetic to employees' safety concerns, but he conceded that the lifts were old, and that his father would never replace them.

B. Charging Party Miller

1. Miller's background and concerns about safety and pay at Denny's

Miller began working for Respondent in early 2011, with a 7:30 a.m. to 5 p.m. schedule. Although other employees shared their concerns about pay and safety issues, Miller by far was the most vocal. From 2012, or earlier, he regularly complained to coworkers about Respondent's failure to pay the installers overtime for the Saturdays they worked, and about Respondent's failure to pay him and others for the extra half hour worked each day while sometimes docking their pay for being late to work. He also complained about the consistently poor lift conditions. Although he mostly complained to his coworkers throughout his tenure at Denny's Transmission, he also raised these safety and pay issues with the shop managers (Dennis and then Harris), as well as with Van Loo. (Tr. 230.) In fact, Van Loo reluctantly admitted that Miller "was more of a complainer than the rest." (Tr. 38–39.) Miller specifically recalled expressing his concerns about the lifts to Van Loo, but having Van Loo just laugh and comment that, "they're old, that's the way they are." In late December 2013, Miller told Van Loo, in the presence of Gallegos and Tellez, that "the lifts were junk, they're going to kill one of us one day," and "they needed [to be] repaired and fixed . . . [i]t's unsafe. It's not a good work environment." (Tr. 306.) He also recounted telling Van Loo about overtime issues 3–4 times in 2013, and asking "why we weren't getting paid the other two and a half hours a week. But if we were late for 15 minutes or 20 minutes, we get docked." He said that Van Loo had no response. (Tr. 299–302.)[8] On another occasion in February 2014, Van Loo witnessed one of the cars that he was working on "[come] down real fast." Miller told him "[t]hat's what's wrong. That's unsafe, bad equipment and it's going to hurt somebody one day . . . " According to Miller, Van Loo "just. . . kind of laughed and walked away." Miller did not recall specific conversations with coworkers about work-related issues between January and April 2014. (Tr. 306–308.)[9] Further, he did not remember discussing terms and conditions of work with Van Loo after the February incident. Despite numerous complaints, Miller never received any warnings, threats, or other discipline for voicing these opinions and concerns to coworkers or management.

At some point after he began working for Respondent, Miller also began to tell some of his coworkers, on a fairly regular basis, that he wanted to find a job with better pay, benefits, and working conditions. In fact, he never hid the fact that he was unhappy with the working environment at the south shop and what he perceived as management's disregard for the employees. As discussed later in this decision, I credit testimony that he even told some coworkers in 2014 that he might start looking for other work when he took his vacation. However, there was no dispute that at least prior to June 5, Miller never followed through on his threats to leave his job at Denny's Transmission.

2. Miller's departure from the south shop

a. Days leading up to Miller's departure

On May 23, the day before Memorial Day, Miller used one of his 5 vacation days and set out on an annual Memorial Day weekend fishing trip with his friend/coworker Weightman. During their trip, Miller told Weightman that he was thinking about quitting, and that he was "just tired of all of the bullshit around the shop." He also complained of being "tired of the unsafe working conditions," and "unhappy with not getting paid his overtime." (Tr. 196–197.) Weightman admitted that after this trip, he told one of their coworkers, Berdusco, that Miller was thinking about leaving Respondent's shop. As recounted by Van Loo, Miller returned to work on May 27, the day after Memorial Day, worked through half a day on May 30, and used his remaining 4 vacation days on June 2–5. Before leaving work on May 30, Miller received two pay checks for pay period May 23–30—one for 40 hours (including 8 hours of vacation pay for May 23) and another for 32 hours of advance vacation pay. (Tr. 91–97.)

Miller insisted, however, that he took all of his vacation from May 23–29, and received two pay checks on May 22 (not May 30)—one for 40 hours worked May 16–22 and one in advance for 32 hours of vacation pay for pay period May 23–29. He also denied working on May 30 or receiving a second pay check on that day for pay period May 23–29, which included 32 hours of work and 8 hours of vacation.[10] (Tr. 313–319,

[7] I credit Weightman's testimony that the hydraulic lift seals had not been replaced since the early 2000s, but that he replaced oil in one or more of them in 2014 after Van Loo and/or Harris failed to do so. (Tr. 189, 266–267.) He was specific about what was repaired and when, while Van Loo was evasive, and could not say with any certainty when and how repairs were made. Therefore, I discredit Van Loo's testimony regarding this matter. (Tr. 40.)

[8] I do not credit Van Loo's testimony that Miller only complained to him about overtime and pay issues on one occasion (in 2011). It is contrary to the other witnesses' testimony that Miller complained about overtime to everyone, including Van Loo and other managers after that time. (Tr. 191–193, 229–230.)

[9] Miller's testimony regarding his conversations with Van Loo about the lift conditions was not disputed.

[10] Weightman recalled that Miller continued his vacation right after the holiday. (Tr. 197–198.) Tellez initially testified that she handed Miller his vacation check and last paycheck on a Friday in May before

325–326.) However, two of Miller's pay stubs provided by Respondent, along with Miller's own pay records, show otherwise. They confirm that Miller was in fact paid two checks, with a pay date of May 30, for pay period May 23–29—the one for 40 hours (including 8 hours of vacation) and the other (that he claimed to have received on May 22) for 32 vacation hours.[11] (R. Exhs. 1 and 2; GC Exh. 5.) Given this documentary evidence provided by both parties, I credit Van Loo's recollection over that of Miller's, and find that Miller went on vacation on May 23, returned to work on May 27, and used his remaining vacation time on June 2–5.[12] Therefore, Miller was due back to work on Friday, June 6.

Miller recounted that after walking to his truck and looking at his paychecks (on what I have found to have been May 30), he returned to the office and confronted Van Loo with his belief that his pay was short by 1 vacation day. He stated that Van Loo's response was that "you're in a hurry. I'll explain it when you get back. You don't understand it usually anyway when I try to explain it to you." (Tr. 321–322, 325–326, 329.) Van Loo did not specifically rebut this testimony; rather, he testified that when Miller received the two paychecks, he (Miller) said that "I'll see you in a week," and left the shop. (Tr. 103.) I credit Miller's testimony that he complained to Van Loo about a shortage in his pay. It is apparent from other evidence discussed later in this decision that Van Loo knew that Miller had an issue with his vacation pay. (See Tr. 210 and GC Exh. 2(b) at file GP040065, 00:51–00:54.) I also note that a review of the pay documents discussed earlier in this decision show that Miller was in fact paid for his 5 vacation days, as well as the Memorial Day holiday.

While this discussion may have taken place, I do not credit Miller's assertion that Van Loo also promised to pay him what he believed he was due when he returned from his vacation. Miller did not mention in his affidavit excerpt concerning this discussion (read at hearing) that Van Loo promised to pay him money owed after his vacation. (Tr. 322.) Notably, neither Miller nor Weightman, when testifying about which issues of Miller's they discussed on their Memorial Day weekend fishing trip, mentioned Miller's pretrip encounter with Van Loo about a shortage in 2014 vacation pay, or promise by Van Loo to pay Miller on his return. This also lends support to the finding that any receipt of two checks or advance vacation pay, or discussions thereof between Miller and Van Loo, took place on May 30 and not on May 22.

b. Miller's departure

Miller next returned to the south shop in the afternoon of the last day of his vacation, which based on my findings above, was June 5. There is no dispute that he brought his 6 foot utility trailer to the south shop that day, solicited Weightman to help him load his personal tool carts that he used at work onto his trailer, and left the shop. There is also no dispute that Van Loo was not present at the south shop that day, Van Loo and Miller never spoke that day, and that Harris was present and relayed a telephone message from Van Loo to Miller. Van Loo testified that Harris telephoned him that afternoon to tell him that, "Ron's [Miller] here to pick up his tools." He said that when he asked Harris if Miller quit, Harris "said yeah." (Tr. 55.)[13]

According to Miller, he first went to the south shop early that morning to speak to Van Loo one more time about his pay and safety concerns and to try to get his additional vacation pay. As previously stated, there was no evidence that Van Loo promised Miller a check at any time, much less on the day before he was due back from vacation. Miller testified that Tellez told him that Van Loo had not left a check for him, but that she would talk to him to find out what was "going on." He said that he told Tellez that he would return later that day. Miller returned to the south shop between 11:30 a.m. and 12 p.m., but first decided to pick up his 16-foot utility trailer. He claimed that he "was thinking about it, holding my money before my vacation and not having money then when I showed up that something was up. So I grabbed my trailer too and I came back to the facility of Denny's Transmission." (Tr. 329.) He said that he had another conversation with Tellez, who told him that "Mike [Van Loo] said that there's not any checks and to turn in your uniform or . . . where are your uniforms." Miller stated that he asked if turning in his uniforms meant that he was fired, to which Tellez responded that she did not know, "[y]ou'll have to talk to Mike." (Tr. 329–330.) Miller asserted that he believed this meant that he was being terminated because that is what it normally meant when Van Loo asked employees to turn in their uniforms. (Id.)

I do not credit Miller's testimony that he initially went to the south shop that morning and talked to Tellez. Nor do I credit

Memorial Day weekend, but also recalled that he worked 5 hours that day. However, when shown copies of two of Miller's paystubs, both from pay period May 23–29, Tellez acknowledged that she would have given him both checks, which included regular and holiday pay, on the pay date listed, May 30. (Tr. 151–152, 177; R. Exhs. 1 and 2.)

[11] Miller subsequently had a pay chart of all of the cash and checks he had received while working at Denny's Transmission prepared by a neighbor, which he admitted was based on paycheck stubs and cash payments that he received from Respondent and provided to his neighbor. This chart clearly and specifically shows that Miller received only one check for the pay period ending on May 22, and the two paychecks as described above for the pay period ending on May 29. (See R. Exhs. 1 and 2; GC Exh. 5, Attachment at p. 14.) Miller was unable to explain the discrepancies between his testimony and his own records. (Miller sent this chart, along with a demand letter for overtime wages owed, to Respondent, which will be discussed later in this decision). (Tr. 367–368.)

[12] I also credit Van Loo's testimony (over Miller's) that Miller worked a half a day on May 30, as his paystub and a bank copy of his last paycheck show that he was subsequently paid for 5 hours worked for the pay period May 30–June 5. (R. Exhs. 3–4.)

[13] The General Counsel served Harris' subpoena at the south shop. However, Van Loo testified that Harris quit his job a few weeks prior, and that he sent the subpoena to Harris' address that he had in his medical file. (Tr. 141–144.) Harris did not appear for trial, but Weightman, Miller, and Van Loo placed him at the south shop on the afternoon that Miller picked up his tools. (Id.) Therefore, I believe that he was there, and credit Van Loo's testimony that he called to inform him about Miller's actions. I reject the General Counsel's argument that I take an adverse inference against Respondent for not calling Harris as a witness, and credit Miller's entire account of this day. My reasons for doing so are set forth in the analysis part of this decision. (R. Br. 10.)

his testimony that Tellez was present when he returned, and relayed the message to him from Van Loo about checks and uniforms. Tellez testified that she was not present when Miller returned to the south shop to pick up his tools, but heard (the next morning) that he came, got his tools, and quit. She was not specifically asked if she saw Miller earlier that morning, but denied talking to him about his uniforms. Rather, she claimed that it was Van Loo who did so. (Tr. 153.) I credit Tellez' testimony that she never had a discussion with Miller about his uniforms on June 5. Although neither Weightman, General Counsel's witness, nor Gallegos, Respondent's witness, was specifically asked, I note that neither mentioned Tellez' presence on the day that Miller picked up his tools. Therefore, I will not, as the General Counsel argued in its brief, take an adverse inference against Respondent and credit Miller's testimony that she was. (R. Br. 5.) In addition, Weightman testified that Miller told him that he was at the shop for the second time to get his check, but they would not give it to him "because he was short on his uniforms." However, this is inconsistent with Miller's testimony that he was told "there's not any checks and to turn in your uniform," and his indication that he did not know about his missing uniforms until the next day. (Tr. 198, 329–330.) In fact, no one corroborated Miller's testimony that Tellez was at the south shop that day, or that he was there that morning.

As stated above, Miller did return to the south shop later that day and took his tools. While he and Weightman were loading his tools, Harris came out and gave Miller a message from Van Loo to remind Miller not to forget to take his camper shell that he had left at the shop. Van Loo did not deny sending this message to Miller through Harris. Furthermore, while Miller did not know who Harris was talking to, he recalled that Harris had a telephone in his hand when he relayed the message. Miller admitted that Harris never said that he had been fired, nor did Miller ask Harris if he had been. When they finished loading Miller's trailer, Miller left the shop. (Tr. 330–332.) There is no evidence that Respondent terminated Miller on June 5, or that Miller had reason to believe that he was going to be terminated when he returned to the south shop with his trailer.[14] Rather, the evidence shows that Miller's anger and frustration with Van Loo grew to the point where he, on his own volition, decided to take his trailer to the south shop and get his tools. Even if I believed Miller's entire account, I would not be persuaded that he had reason to believe on June 5 that he was being discharged or would be, or to think he needed to get his trailer and remove his tools from Denny's Transmission. Nevertheless, the amended complaint alleges that Miller was actually terminated on day after he removed his tools from Denny's Transmission.

On the next morning (June 6), Miller returned once more to the south shop at about 8:30–9 a.m. to talk to Van Loo about "what I came for yesterday. . . to talk about the pay issues and the unsafety and my money."[15] He claimed that he also asked "[w]hy don't I have my money," and that Van Loo responded that, "[y]ou're not getting a check because I don't see your uniform." Miller said that he told Van Loo that his uniforms were "in the back where they always are," went to get them, and gave Van Loo "his 10 pairs of pants and shirts." Van Loo responded that he was still short one shirt, and to leave his address with Tellez because he would not get any money until he brought it in. Miller testified that he walked to the back of the shop to say goodbye and to let Weightman know what had happened, but before he made it, Van Loo met him and told him to "[g]et the fuck out of here. You don't have permission to be here anymore . . . I should've fired you before your vacation but I took the high road. And you—for running your mouth about the way I pay you guys…Get the fuck out of here." (330–333.) Notably, Miller did not come prepared to work that day; he testified that "I was under the assumption I was being fired, as well as before vacation when I didn't receive my pay then." (Tr. 389.) However, Miller never asked Van Loo if his assumption was correct, nor was there any evidence that Van Loo told him that he was terminated at this time.

Van Loo, on the other hand, denied seeing or talking to Miller on June 6, or at any time thereafter. He testified that on June 6, he determined that Miller was missing several uniform pieces, and told Tellez to issue Miller's last check for 5 hours (for May 30), but not to mail it to him until he turned in his missing uniforms. (Tr. 53–56.) I discredit Van Loo's testimony that he did not see or speak to Miller on June 6, as well as his assertion that all but two shirts and a pair of pants of Miller's just happened to show up on about June 25. (Tr. 58.) Van Loo's testimony about Miller's missing uniforms was particularly confusing and inconsistent. In explaining the uniforms, he testified that "two shirts showed up on June 25th . . . I don't—I mean, they—some of the guys could have taken them home and turned them in, but two shirts showed up and I made an arrangement with the uniform company and said you could have lost the other one . . . And they said okay, we'll just charge you for one shirt." He asserted that this was the reason that on June 25 one shirt charge was taken off Miller's check, "but for some oversight the check didn't get issued until after July." (Tr. 57–58.) Van Loo next attempted to explain that some of Miller's uniforms might have been clean and some dirty, and "he was short four shirts and one pant. Is that right? Three shirts and one pant, I believe." (Id.). Van Loo when asked again when he "figured this out," responded, "On Friday the 6th." (Tr. 59.) On the other hand, Miller's account about the substance (but not the date), of his last conversation with Van Loo was more specific, and moreover, consistent with Tellez' testimony that Van Loo discussed the uniforms with him.

None of the witnesses, including Weightman, actually saw Miller at the south shop the day after he picked up his tools. However, Tellez swore that she "never spoke to Mr. Miller about his uniforms. Mike [Van Loo] did that." (Tr. 153.) If this was the case, then I believe that any discussion between

[14] I do not credit Miller's testimony that when he returned for his tools he told Weightman, "I guess I'm getting fired." Weightman did not corroborate this testimony in his description of his encounter with Miller that day. (Tr. 198.)

[15] For reasons stated, I discredited Miller's testimony that he returned to the south shop on May 30 (rather than on June 6). (Tr. 389.)

Van Loo and Miller about missing uniforms must have occurred on June 6. When Weightman came into work "early in the morning" on June 6, Van Loo told him that Miller "won't be coming back," but apparently, no discussion took place as to why." (Tr. 200.) Weightman testified that later that day, when he mentioned that a water bladder (used to hold drinking water) in the parts room looked like one he had loaned to Miller, Tellez told him that Miller had dropped it off that day, but that Van Loo told him to "get the F off the shop or get the F out of the shop." (Tr. 200–203.) Tellez was not asked about this discussion with Weightman, but did not rebut it.

Therefore, I credit testimony that Miller came back to the south shop on June 6, and the conversation between Van Loo and Miller. I do not find, however, that Miller was terminated.

A voided check to Miller, dated June 6, in the about of $72.78 (after taxes) for working 5 hours presumably on May 30, and the corresponding paystub for pay period May 30–June 5, indicate that Van Loo did have a check prepared for Miller on June 6. (R. Exh. 3.) Respondent also provided a pay statement, dated July 11, which reflected that there was a "[l]ast check" prepared for and sent to Miller in the amount of $49.55 (the $72.78 for 5 hours worked on May 30 minus $23.23 presumably for one missing uniform shirt). Miller admitted that he received the $49.55 check, dated July 11, but claimed he did not know what it was for. Based on his own version of the conversation with Van Loo on June 6, I believe that he did know what it was for. (Tr. 349; R. Exh. 4, GC Exh. 9.)

c. Determination that Respondent did not terminate Miller

Van Loo's telling Miller to leave the premises on June 6, or for that matter, that he should have terminated him before his vacation, vacation, does not resolve the question of whether Miller was terminated or quit his job at Denny's Transmission. It is entirely believable that Van Loo would have reacted in this manner just by learning that Miller had come to the south shop, before the end of his vacation, taken his tools, and quit. Although Miller had threatened to quit many times in the past, this is the first time that he actually removed his personal tools from the south shop and left.

Gallegos testified that when Miller came to collect his tools, he told him "hey, I think, I'm done. I'm going to get out of here. I will find another job and — and find another job with better benefits." He said that "[t]hat's it. I don't talk to him about nothing else." (Tr. 405.) After he was asked again what Miller told him on the day that he picked up his tools, Gallegos responded that "here's what he told me, only that he told me, I'm quit because I find—I find another—another job with better benefits." When asked to clarify if Miller told him that he had found another job with better benefits or that he was quitting to do so, he said that "he's he can't find ready —he's find already —he find already another job, so he started working already." (Tr. 408–409.) Gallegos also stated that several months prior to that time, Miller "started telling me, hey, so this is—I'm try to—when I go to—for vacations, then I go to try to find another—another job with better benefits, but I only go—I going to wait on my vacations." (Tr. 403, 405–406.)[16] Although Miller denied telling anyone months before he left Denny's Transmission that he planned not to return after his vacation, Gallegos and Tellez testified that they heard him say this. Further, Miller finally admitted (after initially denying) that when he returned to get his tools, he told Gallegos that he "had [a job] opportunity." Before that time, he told Weightman that he was thinking about quitting, and Weightman related the same to one of their coworkers. If Miller told Gallegos that he had another job opportunity on the day that he took his tools and left, I believe and credit Gallegos' testimony that Miller told him that he had a better job with better benefits. I also credit Gallegos' and Tellez' testimony, over Miller's denial, that Miller did tell them a few months before that he planned to leave Denny's Transmission or look for another job when he took his 2014 vacation. Given undisputed testimony that Miller often spoke of leaving Denny's Transmission, and Miller's admissions discussed below that he did look for work and received job offers during his 2014 vacation, I believe that more likely than not, he told others prior to May that he might do so.

On the evening of June 6, Miller sustained a severe hand injury while working at home. He went to the emergency room, was admitted early morning on June 7, and was discharged on June 10. (Tr. 350–352; Exh. GC 10.) Miller not only acknowledged that he had looked for work before and during his vacation, but also finally admitted (after first denying) that he received one or two open invitations to work for other companies at any time he was ready to work. He also finally admitted that he could have started working somewhere else on June 9, only 3 days after he left Denny's Transmission, but for his hand injury. Gallegos testified that on the Monday after Miller collected his tools, Weightman told him that Miller was to start another job, but had cut his hand. (Tr. 406–408.) I credit Gallegos' testimony on this point given Miller's inconsistent, hesitant, and evasive testimony, set forth below, about whether or not he sought and found other employment before and after this time:

(by Respondent's Counsel)
Q: Within the four months prior to that day, or prior to the end of May, did you tell anyone at Denny's that you were planning to quit?
A: Planning to quit? No.
Q: Did you tell anyone that you were looking for another job?
A: No.
Q: You didn't tell Dale [Weightman]?
A: That I was looking for another job? No.

[16] I disagree with the General Counsel's argument that Gallegos' testimony was not reliable because he was asked direct questions, and because of a language barrier. (R. Br. 8.) Gallegos had already credibly testified that Miller told him that (on the day he collected his tools) that he was "done." I also credit Gallegos' repeated assertion that Miller told him that he had a better job. Gallegos was not the most fluent in English, and admitted to being more comfortable speaking his primary language (Spanish). However, no one requested an interpreter for him, and thankfully, he understood what was asked of him and was able to adequately articulate his responses. He also stated that he could read and understand English.

Q: In late . . . May or early June of 2014, did you tell any coworker that you had worked with that you, in fact, had just quit?

A: No.

Q: Did you tell any coworker that you had found a job with better benefits?

A: I said there's more jobs and more benefits out there, yes.

Q: But you never that you had found a job?

A: Not that I found a job or going to any job, no.

Q: Had you interviewed for any job prior to that, prior to your last day?

A: I talked to a few people.

Q: Did any of them indicate their willingness to hire you?

A: Yeah.

Q: Who?

A: I can't remember the name of the business.

. . .

Q: So you had sought and someone said they would be willing to hire you prior to your last day?

A: If I was willing to quit and go out and about and change my ways, then there were people willing to hire, yes.

. . .

(By Judge)

Q: What do you mean if you were willing to quit and change your ways?

A: I went in Thursday to talk to Mike about the pay and the shop issues and he wasn't there. I wanted to talk and see what he had to say about the pay and, you know, the environment that we work in…that was on the 29th, my last day of vacation [found to be on June 5].

. . .

(Tr. 388–389).

On rebuttal:

(by General Counsel)

Q: Mr. Miller, when you picked up your tools on May 29, 2014, did you tell Leo Gallegos that you had found another job?

A: No. I told him—no. I did tell him that I was to talk to Mike about our job.

Q: Did you tell Mr. Gallegos that you were going to start a new job?

A: No. I said I had an opportunity.

Q: Did you start working somewhere else after you picked up your tools?

A: No.

. . .

[Tr. 415]

(By Judge)

Q: Mr. Miller, you testified that you hurt your hand…later in the day on June 6, 2014, correct?

A: Correct.

. . .

Q: Had you accepted a job at the time that was to begin on that following Monday?

A: I had an opportunity to go to a job, yes. There was a couple of different places that said that they would hire me and give me another job, and I said that I would like to talk to Mr. Van Loo.

. . .

Q: So—well, on June 6th, had you accepted a job that you planned—or had you planned to start working for another company the following Monday?

A: I talked to somebody about a job working on there, but I was going to talk to Van Loo first . . . [t]there was no commitment of me starting a new job.

***

Q: Okay. So now on June the 6th, and I'm talking about the date that you testified that you hurt your hand and that I have the hospital records for, on that Friday, at that time, had you accepted a job or planned to start a job with another company on the following Monday? Before you hurt your hand.

A: Before I hurt my hand, I talked to people and—

Q: On that day before you hurt your hand, on June the 6th, Friday, had you planned to start working for anyone on that following Monday?

A: I had to talk to somebody. Yes [emphasis added], would be my answer.

. . .

Q: Okay. So was it your understanding that had you not hurt your hand that you would have started working on Monday?

A: No, I wouldn't have started on Monday.

Q: When were you due to start?

A: When I was ready to start.

Q: Okay. What do you mean when you were ready to start?

A: Well, after leaving and being out at Mike's and being at home and taking care of my kids, I was going to take a little time off.

Q: Okay. So it's your testimony that hurting your hand did not—was not the reason that you start—did not start working somewhere else the following week or the following Monday?

A: I couldn't work with my hand the way it was even if I wanted to.

. . .

Q: …but you could not start because you hurt your hand?

A: I could not start work Monday because I had my hand cut.

Q: Okay. Had you not cut your hand on that weekend, would you have started working somewhere else on that Monday?

A: Possibly [emphasis added].

. . .

[Tr. 416–419]

(by the General Counsel)

Q: Mr. Miller, was there—who was the name of this company that offered you a job and that you were going to start working for on June 9, 2014?

A: The company's name that I talked to was—there was two different companies. There was the Sun Devil and there was—I can't remember the other one . . .

Q: Was there any company that offered you a job to work—to begin work on a certain day?

A: Sun Devil.

Q: When were you to begin work at Sun Devil? Is that Sun Devil Auto?

A: Yes . . . [t]here was not a specific set date that I was going to start working. I was going to talk to them on Monday, but I was hurt and in the hospital. I could have started the next week after that.

Q: So—there was not a firm date from Sun Devil Auto that said you were going to begin working for them on a particular day?

A: Not on a particular day, no, but I was to be hired.

(Tr. 416–422.) Again, it is clear from this testimony that Miller was not forthright regarding his plan and intent to leave Denny's Transmission.

Finally, Respondent provided a notice to employer, accompanied by a sworn affidavit of the custodian of records for the Arizona Department of Economic Security Unemployment Insurance Program (Department of Economic Security); it stated that in September 2014, Miller filed a claim for unemployment insurance on September 24. This notice stated that Miller listed Respondent as his "LAST EMPLOYER," the reason for separation as "QUIT," and the last day worked as "05/30/2014." (R. Exh. 5.) Respondent completed the employer's section of the form, indicating Miller's last day of work as "6/2/2014," and the reason for Miller's separation as "Voluntarily Quit." Respondent also stated that Miller "quit without notice. He was paid his vacation, through the Day He quit." Another notice sent to Respondent on November 10, 2014, indicated that the claimant had discontinued filing before any unemployment benefits were due. (Id.)

Miller, on the other hand, swore that he never completed an application for unemployment benefits or reported to the Department of Economic Security that he quit his job at Respondent's shop. He claimed that he started but never completed an unemployment application online, and only went to this state agency to apply for state Medicaid benefits right after his June 6 hand injury. (Tr. 373–378, 381–382.) However, on cross-examination, he stated that he did not recall what he was asked or what he was told by anyone at the Department of Economic Security. (Tr. 373.) When asked if he might have applied for unemployment benefits on September 24, the date on the notice (and several months after he applied for medical benefits), Miller responded, "[i]t's a possibility," and then he replied, "I don't know." (Tr. 384.) On re-direct, when asked if "anyone from the Department of Economic Security [assisted him] in filling out the form for unemployment compensation benefits, not AHCCS [Medicaid] benefits, but unemployment compensation benefits," on September 24, 2014, he said, "Yes." When asked if he told the individual who was helping him to fill out the form whether he had been terminated or whether he quit, he answered, "I never said I quit." (Tr. 392–393.) Based on Miller's inconsistent, testimony, and other credited evidence, I give some weight to this evidence from the Department of Economic Security, and find that it supports the position that he quit.

All said, I find that the evidence does not support a factual finding that Miller was terminated. Rather, I find that he voluntarily left his job at Denny's Transmission on June 5, the day that he returned with his trailer and retrieved his personal belongings. After carefully weighing and evaluating all evidence presented, including credible and incredible testimony from the key witnesses, and documentary evidence, I find that the General Counsel, who has the inherent burden to prove that Miller was terminated, has not met that burden.

4. Miller's demand letter

On July 7, Miller sent a four page demand letter, with attachments, to Respondent at the south shop address by registered mail. On the same day, he also hand delivered a copy of this letter, without the attachments, to Dennis at the north shop, as he believed that Dennis would be more sympathetic to his cause, and talk to his father on his (Miller's) behalf. This letter and attached pay charts were prepared by Miller's neighbor, but with information, cash pay records, and paycheck stubs provided by Miller. Miller demanded that Respondent pay him $10,000 within 10 days of the date of the letter, or else he would either file a lawsuit for unpaid overtime/wages or file a claim with the Department of Labor, both of which would involve or include all of Respondent's employees. Regarding any legal claims, Miller set forth a formula for a total estimated amount of $400,000 for which Respondent would be potentially liable for unpaid overtime/wages, attorneys' fees, and penalties, for all of its employees at both transmission shops. (GC Exh. 5.) Shortly thereafter, Dennis immediately contacted Van Loo and told him about Miller's demands. Van Loo did not respond to Miller's demands.

I credit Miller's testimony that he sent and hand delivered his demand letter on July 7. Consequently, I do not believe Van Loo's and Dennis' testimony that they actually received copies of the letter several weeks before July 7 (in June). First, July 7 is the date on the demand letter, and moreover, Dennis' testimony contradicts his sworn affidavit where he stated that "[o]n July 7/7/2014 Ron Miller dropped off the demand letter to my shop and asked me to read it over and discuss it with my dad." (Tr. 127.) Finally, the United States Postal Service receipt verifies that the demand letter was sent on July 7, but that delivery was refused on July 8. (GC Exh. 6.)

B. Charging Party Weightman

Weightman worked for Respondent from July 1999 until he was terminated on July 8, 2014, and according to Van Loo, was one of the best rebuilders that he had ever employed. He and Miller kept in touch with each other after Miller left Denny's Transmission. In mid-June, 2014, Miller told Weightman that he was preparing a demand letter for Respondent with the assistance of his neighbor; however, Weightman was not very confident that Van Loo would read it, but nevertheless supported Miller's efforts. On July 6, Miller told Weightman about his plan to send his demand letter to Van Loo by registered mail on July 7, and to personally deliver a copy to Dennis. Weightman believed this was a good idea, and both agreed that Dennis would be more likely to read the letter, and then convey its contents to his father. Although Weightman was not asked, I believe that more likely than not, Miller shared with him the contents of the letter.

As previously stated, on July 7, Van Loo carried out his plan regarding his demand letter. Later that day, when Van Loo

asked Weightman if he knew what Miller was thinking, Weightman denied having talked to Miller. Van Loo told him that Miller had delivered "something" to Dennis asking for overtime, but that he did not understand why he was doing so. Weightman testified that he did not want to divulge what he knew to Van Loo. Early on July 8, Harris complained to Weightman that Miller had "listed his cash [payments at Denny's Transmission] on his overtime demand letter," and that they would all get into trouble because of it. In response, Weightman told Harris that Van Loo should have just given Miller his check. Their conversation ended with Weightman asking Harris to check with Van Loo about a part that he had ordered. (Tr. 208.) Apparently, Harris returned to the office and related to Van Loo what Weightman said. In response, Van Loo told Harris that he was going to "end this circus." (Tr. 79–80.)

Next, Van Loo confronted Weightman in his work room and flat out fired him. [17] He told him that he was not "company minded," and that he just wanted to take Miller's side. When Weightman asked what he had done to take Miller's side, Van Loo rebuked him for having said that he (Van Loo) "should have just paid him his check."[18] Van Loo also commented that all of the employees knew that they get docked for uniforms. Weightman reiterated that if Van Loo knew what had angered Miller, then he should have just paid him, to which Van Loo replied "[t]hat's not what pissed him off. I paid him his 50 bucks and I paid him for his vacation. I could have fired him before then." (GC Exh. 2(b).)[19] When Weightman insisted that he was not involved with Miller, and had not supported him, Van Loo accused Weightman of having "a loyalty to him." Weightman tried to reason with him, but Van Loo ended the conversation by telling him that he just did not seem to be "happy [there] and leaving the workroom.

At hearing, for the first time, Van Loo testified that the real reason that he terminated Weightman on July 8 was because of Tellez' complaint a week or so earlier that Weightman, with whom she had a consensual affair about ten years earlier, had been sexually harassing her for the year and a half that she had been working for Respondent.[20] Van Loo admitted that he lied to both Weightman and to the Board in his affidavit about why Weightman was terminated because Tellez had sworn him to secrecy, and had not released him to tell the truth until a few weeks before the hearing. Tellez corroborated this testimony, and claimed that she finally told Van Loo that she would tell the Board the truth because she could no longer tolerate the lies that Weightman and Miller were telling about Van Loo and his employment practices. Weightman admitted to having had an earlier affair with Tellez, but denied that he sexually harassed her or otherwise acted inappropriately with her since her return to Denny's Transmission.[21]

I discredit Van Loo's testimony as to why he really terminated Weightman. It is unbelievable that Tellez suddenly decided to release Van Loo from his vow of secrecy regarding her sexual harassment allegations weeks before the hearing when the evidence indicates that she was well aware of Miller's and Weightman's complaints and ultimate charges lodged against Respondent as early as in mid to late 2014. I also find it incredible that Weightman, who never tried to contact Tellez or resume their affair in 10 years, sexually harassed her on a daily basis at work in close proximity to Van Loo and others, and apparently on occasion in Van Loo's presence. In addition, I discount her testimony that Weightman watched pornographic videos on the computer at a desk next to hers in the front office, and in close proximity to Van Loo's desk in the same room, on a daily basis without Van Loo's knowledge. Also questionable is Van Loo's admission that he had previously observed Weightman hitting Tellez on her bottom with one of the shop rags at work, but did not consider such behavior to be sexual harassment or even inappropriate until Tellez confided in him. Furthermore, Van Loo testified that he immediately accepted Tellez' word without question or investigation. Moreover, Van Loo's Board affidavit testimony about why he terminated Weightman is consistent with Weightman's testimony, as is video and audio tape documentary evidence of Weightman's termination.

Although Van Loo also testified that he heard that Weightman had bad mouthed him for quite some time, and used profanity when doing so, and was tired of it, he swore at the hearing that this was not the reason that he terminated him. In fact, Respondent's former vending machine provider ex-

[17] Weightman video (and audio) recorded the entire exchange between he and Van Loo, during which Van Loo fired him. See the disc at GC Exh. 2(b) at file GP030065, 27:53–end and file GP040065, beginning–2:05. I note here that I directed the court reporter (during hearing and afterwards) to transcribe these recordings, but this was not done. Nor did the court reporter or reporting service offer any explanation as to why the recording was not transcribed. Therefore, I relied on testimony and the audio video recording which is adequately audible.

[18] See GC Exh. 2(b) at file GP040065, 00:38–00:42).

[19] See GC Exh. 2(b) at file GP040065, 00:51– 00:54. As previously determined, Van Loo's comments that he should have fired Miller before his vacation, which were made after Miller quit, did not persuade me that Van Loo terminated him.

[20] Tellez previously worked for Denny's Transmission with Weightman. Tellez testified that Weightman, who had not contacted her since they ended their affair years before, began and continued to regularly sexually harass her at work by kissing her, grabbing her, touching and hitting her on the behind with a shop rag or his hand, and pinning her against walls and doors at the shop. She claimed that after about a year and a half of this alleged treatment, she became fed up and tried to resign. She testified that it was then that she ended up confiding in Van Loo, and insisting that he not tell anyone because she did not want to get Weightman in trouble, and did not want his wife or her boyfriend to find out.

[21] Weightman denied sexually harassing Tellez. He testified that "[t]here was no sexual contact. There was a little flirting relationship. Sometimes I'd be in the office, and she'd come in from the restroom or wherever she was coming from. And, you know, she'd slap me on the butt or pinch me on the butt cheek. I'd do the same to her. If she asked me to massage her shoulders, I'd massage her shoulders." (Tr. 217–218.) He also denied pushing her up against the wall or trying to kiss her. He did, however, state that he had seen Van Loo touching and fondling Tellez, and grabbing her butt cheek, and had seen Tellez ask Van Loo to massage her shoulders. Tellez never told him not to touch her, nor had he ever heard from anyone at the shop that Tellez had complained about him. If these things were going on, all involved acted inappropriately. Nevertheless, as stated above, I do not believe that this was why Weightman was fired.

plained that he told Van Loo over the years that he should not put up with Weightman, but that Van Loo always disregarded his advice. (Tr. 219.)

III. DISCUSSION AND ANALYSIS

A. Preliminary Matters

1. Orders regarding the parties posthearing briefs and submissions

Both Respondent and the General Counsel filed post hearing briefs in this case on or before May 27, 2015 (Charging Parties did not file separate briefs). In its brief, the General Counsel argued that Respondent's post hearing brief should be stricken because it was not properly served. Specifically, the General Counsel asserted that the office only received notice of Respondent's filing from the Board's e-filing service, Respondent's brief did not contain the required statement of service, and therefore, pursuant to the Board's Rules and Regulations Section 102.42, the brief must be rejected. Respondent filed its objection to the General Counsel's brief on June 9, asserting that it and any brief submitted by counsel for the charging parties, be stricken. Respondent contended that the General Counsel's brief was not properly served on the due date, and that the General Counsel attempted to falsify evidence of service. Respondent failed to offer explanation for its service deficiencies alleged by the General Counsel. The General Counsel did. On June 19, 2015, the General Counsel filed its opposition to Respondent's filing and motion to strike respondent's reply brief since there was no request for leave to file such.

Regarding Respondent's initial post hearing brief, since Respondent found itself without counsel after the hearing in this case, and since the General Counsel received Respondent's brief without prejudice or harm, I deny the General Counsel's motion to strike that brief. However, I do not accept or consider the attachments to Respondent's initial brief (marked as "A-1" through "A-4"). They were not entered into or accepted into evidence at the trial, nor was there a request that the record be opened to do so. Moreover, these documents bear no relevance on the events in this case. Therefore, they are stricken, and have not been considered in analyzing or otherwise determining the outcome in this case.

Next, I accept the General Counsel's explanation regarding service, and find no merit in Respondent's accusation that the General Counsel or its staff falsified any service documents in connection with the service of the General Counsel's brief. Respondent received the General Counsel's brief, without harm, by email and postal mail. As stated, the General Counsel also moved to have Respondent's reply brief stricken. I grant this motion, and find that Respondent's June 9 submission includes and/or constitutes a reply brief, responding to the General Counsel's arguments on the merits of the case and credibility. The Board's Rules and Regulations do not provide for the filing of such a response, nor did Respondent request to file one. Therefore, I have not considered such response and it is hereby stricken.

Finally, I must also strike, sua sponte, all except page 1 of attachment 4 (labeled GC Exh. 4) of the General Counsel's June 19 opposition and motion to strike. It includes Van Loo's Board affidavit in its entirety and attached investigative statements, which were not introduced or admitted into the record during the hearing or thereafter. I have not considered this part of the General Counsel's submission, and it is hereby stricken.

2. Tellez' agency status within the meaning of Section 2(13) of the Act

I will next address the disputed complaint allegation that Tellez was Respondent's agent within the meaning of Section 2(13) of the Act. The Board 's test for determining agency status (based on the common law principles of agency) is "whether, under all of the circumstances, employees would reasonably believe that the employee in question was reflecting company policy and speaking and acting for management." *Pan-Olston Co.,* 336 NLRB 305, 306 (2001), citing *Waterbed World*, 286 NLRB 425, 426–427 (1987) (and cases cited therein). The Board explained that it considers how the alleged unlawful conduct is related to the positions and duties of the employee. In addition, the Board takes into account the context in which the employee's alleged action occurred. (Id). The Board has also found that it will consider consistency between statements or actions of an alleged employee agent and those of the employer, and has found that "such consistencies support a finding of apparent authority." Id. at 306; *Albertsons, Inc*., 344 NLRB 1172, 1172 (2005).

The General Counsel argues that employees, including Miller, would reasonably believe, as Miller did, that Tellez acted as Respondent's agent within the meaning of the Act, and reflected its policy to turn in uniforms, allegedly because he was being terminated, during her interaction with Miller on the day that he returned to pick up his tools. (R. Br. 24–26.) Respondent generally denied in its answer that Tellez was its agent, but did not address this allegation in its brief. I find that at times, in carrying out some of her primary duties, Tellez probably did act as Van Loo's agent regarding some vacation and leave matters. However, since I have found here that Tellez did not relate any uniform policies to Miller, on behalf of Respondent or otherwise, I find that she did not act as Respondent's agent regarding any interactions with Miller. Nor did she tell him that he was terminated. Even in Miller's unaccepted version of his discussion with Tellez, she told him that she did not know what turning in uniforms meant, and that he would have to speak to Van Loo. In the cases cited above, the purported agents were found to have unlawfully interrogated employees and/or warned or told them not to engage in protected activity. Such was clearly not the case here.

3. Adverse inferences should not be drawn regarding Respondent's failure to call Harris and failure to recall Tellez

I reject the General Counsel's argument that I should draw an adverse inference against Respondent for not calling Harris as a witness who is "assumed to be favorably disposed to Respondent and likely has knowledge regarding factual questions at issue." (R. Br. 10–11.) The General Counsel cites *Daikichi Sushi*, 335 NLRB 622 (2001) to support its position. However, in *Daikichi Sushi*, there is no evidence that the respondent's president who was not called to testify was no longer employed by Respondent. (Id). Further, in *International Automated Ma-*

chines, 285 NLRB 1122, 1122 (1987) (quoted by the Board in Daikichi Sushi), the Board recognized, in upholding an adverse inference, that the missing witness was at the time a member of management and respondent's coowner. Here, I accept and credit testimony that Harris voluntarily stopped working from Denny's Transmission. First, I am not convinced that it can be assumed that Harris' testimony would be favorable to Respondent. As the General Counsel pointed out, Harris had a history of quitting and coming back to Denny's Transmission, and he might have left after some disagreement with Van Loo. Next, it is well settled Board law that it is inappropriate, and in fact error, to draw an adverse inference from an employer's failure to call a former supervisor or manager as a witness, since in such circumstances, it may not be reasonably assumed that the witness would be favorably disposed toward the employer. *Reno-Hilton Resorts*, 326 NLRB 1421 fn. 1 (1998) (judge erred in drawing adverse inference from failure of Employer to call former officials involved in decision to subcontract.); *Irwin Industries*, 325 NLRB 796, 811 fn. 12 (1998) (no adverse inference from failure to call former supervisors); *Goldsmith Motors*, 310 NLRB 1279 fn. 1 (1993) (no adverse inference drawn from failure to call former coowners); *Lancaster-Fairfield Community Hospital*, 303 NLRB 238 fn. 1 (1991) (judge erred in drawing adverse inference against Employer for failing to call former supervisor).

The General Counsel essentially argues that Van Loo's lied about Harris' departure, implying that either Harris still works for Respondent, or that Respondent somehow orchestrated his departure so as to avoid having him testify. Off the record, Van Loo advised that the General Counsel's next witness, Harris, who had not shown up to testify, had abruptly quit. On the record, Van Loo first testified that "[h]e [Harris] just left on Friday and he's never returned." When asked what month or year he was speaking of, he said "[j]ust—probably two weeks ago. I don't remember exactly. It might be four weeks ago." When asked about the circumstances around Harris leaving, he said that "[h]e was upset with something and left . . . [h]e was upset about the way I talked to one of the tool guys." When asked what Harris said to him, he testified that, "[h]e actually didn't say anything . . .[h]e didn't say I quit." He added that Harris told him "that wasn't right," referring to the way that Van Loo had spoken to another employee. Van Loo further testified that Harris just left, without taking his tools and never returned. (Tr. 141–143.) The General Counsel also takes issue with Van Loo saying that he "heard a conversation that happened between my secretary [Tellez] and [Harris'] mother," that " [h]e's not coming unless they put the subpoena in his hand . . . that's what I was told." He clarified that he heard about the conversation from Tellez who had talked to Harris' mother, which I do not find to be a contradiction (as the General Counsel would have me find). He also testified that prior to mailing the subpoena to Harris, he sent a text message to his wife's cell phone that he had a subpoena for him, and about uniforms that he had out.[22] (Tr. 143–145.) Although Van Loo did not readily provide all information about Harris, his testimony presentation on this point does not warrant a finding that he was untruthful about Harris' departure. Thus, the General Counsel has not shown that Harris was still working for Respondent or still under Respondent's control.

Further, in the brief, the General Counsel argued for an adverse inference not because Harris evaded his subpoena, but because Van Loo failed to call Harris as a witness. The General Counsel did not ask Van Loo any follow-up questions about Harris' departure. Nor did he make any efforts to request leave to either enforce Harris' subpoena or request to issue a subpoena duces tecum before me requesting Respondent's payroll records to deduce whether Van Loo was honest about Harris' resignation. Moreover, the General Counsel did not ask Gallegos, who still works for Respondent, and testified after Van Loo, if or when Harris left.

Therefore, I reject the General Counsel's request that I draw adverse inferences regarding each event that Harris is presumed to have knowledge of, to include the entire day that Miller took his tools, the next day when Miller returned to talk to Van Loo, the delivery of the demand letter, and Weightman's termination. (R. Br. 11.) There is no presumption or testimony indicating that Harris had knowledge of or was even present at all of these events, and where he was present and presumably had knowledge, I have considered his absence. *Riverdale Nursing Home,* 317 NLRB 881, 882 (1995) (improper for judge to rely on adverse inference to fill evidentiary gap in General Counsel case). See also *Urooj v. Holder*, 734 F.3d 1075, 1078 (9th Cir. 2013) ("if the burden of proof were satisfied by a respondent's silence alone, it would be practically no burden at all") (citation omitted). Again, I have considered all of the General Counsel's various arguments regarding adverse inferences, including those not specifically mentioned herein. I have weighed all of the evidence, including Harris' absence, in making my credibility determinations in this decision.

4. Witness credibility generally

A credibility determination may rely on a variety of factors, including the context of the witness' testimony, the witness' demeanor, the weight of the respective evidence, established or admitted facts, inherent probabilities and reasonable inferences that may be drawn from the record as a whole. *Double D Construction Group*, 339 NLRB 303, 305 (2003); *Daikichi Sushi*, supra at 623 (citing *Shen Automotive Dealership Group*, 321 NLRB 586, 589 (1996)), enfd. 56 Fed. Appx. 516 (D.C. Cir. 2003). Credibility findings need not be all-or-nothing propositions—indeed, nothing is more common in all kinds of judicial decisions than to believe some, but not all, of a witness' testimony. *Daikichi Sushi*, supra at 622.

Indeed, in this case, as set forth throughout the presentation of the facts, I have believed portions of the witness' testimony and rejected other portions. My findings in these instances were based on consideration of the entire record, particular documentary evidence which either controverted or supported certain testimony, and reasonable inferences drawn therefrom. If there is any evidence not recited herein that might seem to impact the credited facts set forth, I have not ignored such evidence, but considered it and determined it is not essential in deciding the issues, or I have rejected or discredited it as not

[22] Van Loo said that Harris' wife's cell phone number was the only number he had for Harris. (Tr. 145.)

reliable or trustworthy.

B. Respondent Did Not Unlawfully Discharge Miller

Since I have found that the General Counsel failed to carry out his initial burden of proving that Respondent terminated Miller, I find that Respondent did not violate the Act regarding Miller's departure from Denny's Transmission. Therefore, I dismiss the complaint allegation set forth in paragraph 4(b).[23]

C. Respondent Violated the Act When it Terminated Weightman

Section 8(a)(1) provides that it is an unfair labor practice to interfere with, restrain or coerce employees in the exercise of the rights guaranteed in Section 7. Discharging an employee because they engaged in activity protected by Section 7 is a violation of Section 8(a)(1). Section 7 provides that, "employees shall have the right to self-organization, form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . (Emphasis added)." In *Myers Industries (Myers 1),* 268 NLRB 493 (1984), and in *Myers Industries (Myers 11)* 281 NLRB 882 (1986), the Board held that "concerted activities" protected by Section 7 are those "engaged in with or on the authority of other employees, and not solely by and on behalf of the employee himself." However, the activities of a single employee in enlisting the support of fellow employees in mutual aid and protection is as much concerted activity as is ordinary group activity.

Additionally, in order to present a prima facie case that an employer has discharged an employee in violation of Section 8(a)(1), the General Counsel must establish that the employer knew of the concerted nature of the activity. *Amelio's*, 301 NLRB 182 (1991).

The record establishes, and I find, that Weightman engaged in concerted activity with other of Respondent's employees when he discussed and questioned Respondent's poor safety history, and when he discussed with Miller how Miller and other employees were not paid for all hours worked.[24] Weightman also discussed with, advised, and supported Miller in his plan to craft and deliver his demand letter which included Miller's ultimatum that Respondent pay him back overtime or face legal actions which would expose him for failing to pay all overtime to all of his employees. Moreover, Weightman voiced his support for Weightman when he told Harris and Van Loo that Van Loo should have just paid Miller. I find that these actions by Weightman clearly constitute protected concerted activity.

I further find that Respondent was aware of Weightman's protected activity. In fact, in the midst of terminating Weightman, Van Loo told him that he was doing so because of his support of and loyalty to Miller and Miller's efforts to demand money for unpaid work.

When an employer discharges an employee ostensibly for conduct unrelated to protected activity, the Board must determine whether an unlawful consideration—the protected activity of the employee or other employees—entered into the decision making process and, if so, whether it affected the outcome of that process. In such situations, the Board follows the mixed motive analysis articulated in *Wright Line,* 251 NLRB 1083 (1980), enfd. on other grounds 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982), approved in *NLRB v. Transportation Management Corp*., 462 U.S. 393 (1983). Under Wright Line, the General Counsel must satisfy an initial burden of showing by a preponderance of the evidence that the employee's protected activity was a motivating factor in an employer's adverse action. If the General Counsel meets that initial burden, the burden shifts to the employer to show it would have taken the same action even absent the employee's protected activity. The employer does not meet its burden merely by showing it had a legitimate reason for the action; it must demonstrate that it would have taken the same action in the absence of the protected conduct. And if the employer's proffered reasons are pretextual—either false or not actually relied on— the employer fails by definition to meet its burden of showing it would have taken the same action for those reasons, absent the protected activity. See *Alternative Energy Applications*, cited above, 361 NLRB No. 139, at slip op. 3, citing authorities. It has long been recognized that where an employer's reasons are false, it can be inferred "that the [real] motive is one that the employer desires to conceal—an unlawful motive—at least where . . . the surrounding facts tend to reinforce that inference. See *Shattuck Denn Mining Corp. v. NLRB*, 362 F.2d 466, 470 (9th Cir. 1966). Finally, a trier of fact may not only reject a witness' story, but also find that the truth is the opposite of that story. *Pratt (Corrugated Logistics), LLC*, 360 NLRB No. 48, slip op. at 11–12 (2014), and cases there cited.

Applying the above principles to the facts in this case, I find that the General Counsel has clearly established that Weightman's protected activity was the motivating factor in Respondent's decision to terminate him. There is no doubt, as set forth above, that Van Loo exhibited animus against Weightman's protected concerted activity while terminating him, and in fact terminated him for that very protected activity. Van Loo also expressed his animus for Miller's actions in demanding fair compensation when he told Weightman that he should have terminated him before he went on vacation. Moreover, I have discredited Van Loo's testimony that the real reason he terminated Weightman was Weightman's sexual harassment of Tellez (as previously discussed). In my opinion, Van Loo and Tellez concocted this story in order to hide the real reason for Weightman's discharge. I have no doubt that Tellez was complicit in this endeavor since she expressed her disdain for Miller and Weightman pursuing this case.

Also of importance, is the fact that Van Loo never conducted any investigation regarding Weightman's alleged sexual harassment of Tellez. Such a failure to engage in a fair investiga-

[23] I note that there was no allegation, nor evidence presented, that Miller was constructively discharged.

[24] It is well established that wage discussions are "inherently concerted." *Automatic Screw Products Co.*, 306 NLRB 1072, 1072 (1992), enfd. mem. 977 F.2d 582 (6th Cir. 1992). In addition, Board law holds that an employee voicing safety concerns constitutes protected activity where the concerns are "of the moment to all employees." *E.I. Dupont De Nemours & Co., Inc.*, 257 NLRB 139, 149 (1981). See also, *Diagnostic Center Hospital Corp. of Texas*, 228 NLRB 1215 (1977).

tion of alleged incidents of misconduct is a recognized indicia of pretext. See *Midnight Rose Hotel & Casino*, 343 NLRB 1003, 1004–1005 (2004), enfd. 198 Fed. Appx. 752 (10th Cir. 2006) (failure to conduct a fair investigation and failure to give an opportunity to explain actions before imposing discipline "defeat its [respondent's] claim of reasonable belief" that the charged employee engaged in misconduct). See also, *Johnson Freightlines*, 323 NLRB 1213, 1222 (1997).

Next, as stated, Van Loo, his son, and Tellez were not truthful when they testified that Respondent received Miller's demand letter several weeks prior to July 8. In my view, they were obviously trying to cover the fact that Weightman was terminated for his support of Miller.

There was also testimony about how Van Loo was tired of Weightman's continuous criticism and badmouthing him to coworkers and others. However, at the hearing, Van Loo swore that this was not why he terminated Weightman. Moreover, one of his former vendors testified that he advised Van Loo for months or even years about what he believed to be Weightman's insubordination and disrespect towards Van Loo, but that Van Loo essentially ignored him and defended his desire to keep Weightman on. Indeed, it was not until Van Loo received the demand letter from Weightman's friend and travel buddy, Miller, and after he heard on July 8 from Harris that Weightman believed that he (Van Loo) should have just paid Miller, that Van Loo abruptly discharged Weightman. Therefore, I find that Van Loo's shifting reasons, and outright dishonesty regarding those reasons, constitute a pretext for discharging Weightman for engaging in protected concerted activity—in other words, for supporting Miller's cause of attempting to get just compensation for himself and others. Since I have determined that Van Loo's proffered reasons for terminating Weightman are pretextual, I further find that Respondent automatically failed to meet its burden of showing that it would have fired Weightman absent any protected concerted activity.

Accordingly, I find that Respondent clearly violated Section 8(a)(1) of the Act when it terminated Weightman for engaging in protected concerted activity.

D. Respondent Independently Violated the Act by Van Loo's Statements to Employees on May 30 and July 8

In the General Counsel's brief, the General Counsel argues that Respondent independently violated the Act when Van Loo told Weightman, on July 8, that he (Van Loo) could have fired Miller before he went on vacation. (R. Br. 31–32.) What the complaint and amended complaint actually allege is that on about July 8, Respondent, by Van Loo, "threatened its employees with discharge because they had engaged in concerted activities." (See GC Exh. 1(e), pars. 4(c) and (d).) There is no dispute that on July 8, Van Loo told Weightman "[t]hat's not what pissed him off. I paid him his 50 bucks and I paid him for his vacation. I could have fired him before then."[25] I agree that this statement constitutes an independent violation of the Act. This is so even though no one else was present at the time, it was made about a former employee who quit, and was made in connection with Weightman's termination. I find that this statement about what Van Loo could or should have done to Miller for presumably complaining about his wages was one that would reasonably tend to coerce or threaten employees in the exercise of their Section 7 rights. The Board has found that to disregard this type of violation "would effectively privilege unlawful statements—which are independently coercive—when the respondent contemporaneously gives effect to its unlawful words. *Benesight, Inc.,* 337 NLRB 282, 283–284 (2001) (also finding that a statement linking an employee's discharge to the protected activity was "coercive and independently violated Section 8(a)(1) of the Act.").

The amended complaint also alleges that on about on about May 30, Respondent, by Van Loo, "threatened its employees by informing them that Respondent should have fired employees in the past for their having engaged in concerted activities." Based on the evidence presented and the General Counsel's brief, this allegation pertains to Miller's testimony that on the day that he was allegedly terminated (which I have found to be June 6), Van Loo told him that he should have fired him before his vacation presumably for complaining about the way he paid his employees. Similarly, I find that this statement constitutes an independent violation of the Act. Although, I have found that Miller was not terminated, but quit his job at Denny's Transmission, I have also credited in part what took place the day after, and find that Van Loo's statement about what he should have done to Miller was linked to Miller's concerted activities to include voicing his concerns to coworkers about unfair compensation for work performed. This too had or potentially had a coercive and chilling effect on employees' Section 7 rights. Furthermore, based on Miller's history, Van Loo should have known or had a reasonable expectation that Miller would have shared his comment with current employees, including his close friend Weightman.

Therefore, I find that through and by Van Loo's statements to Miller on June 6 and to Weightman on July 8, Respondent independently violated Section 8(a)(1) of the Act.

CONCLUSIONS OF LAW

1. By discharging Charging Party Dale Weightman on July 8, 2014, Respondent has engaged in unfair labor practices in violation of 8(a)(1) of the Act and affecting commerce within the meaning of Section 2(6) and (7) of the act.

2. By making threatening/coercive statements to Ronald Miller on June 6 and to Dale Weightman Dale Weightman on July 8, 2014, that Ronald Miller could or should have been terminated for engaging in protected concerted activity, Respondent independently, on each occasion, violated Section 8(a)(1) of the act.

REMEDY

Having found that Respondent has engaged in certain unfair labor practices, I shall order it to cease and desist therefrom and to take certain affirmative action designed to effectuate the policies of the Act. Having found that Respondent unlawfully discharged employee Dale Weightman, I shall order it to offer him full reinstatement to his former position, or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previ-

[25] See GC Exh. 2(b) at file GP040065, 00:51–00:54.

ously enjoyed, and to make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Further, having found that Respondent made unlawful, coercive statements to Ronald Miller and Dale Weightman, I shall order it to cease and desist from making such unlawful statements to its employees.

Backpay shall be computed in accordance with *F. W. Woolworth Co*., 90 NLRB 289 (1950), with interest as prescribed in *New Horizons,* 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB 6 (2010). In addition, Respondent must compensate Dale Weightman for the adverse tax consequences, if any, of receiving a lump-sum backpay award and to file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). Respondent will also be ordered to remove from its files all unlawful documentation and references, if any, in connection with Dale Weightman's termination on July 8, 2014, and notify him in writing that this has been done, and that any unlawful documentation or references will not be used against him in any way.[26]

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[27]

ORDER

Respondent, M.D.V.L., Inc., d/b/a Denny's Transmission Service, Phoenix, Arizona, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Telling employees or former employees that they or other employees could or should have been (or should be) terminated for engaging in protected concerted activity.

(b) Discharging or otherwise disciplining or discriminating against, employees for joining with or otherwise supporting other employees in discussing overtime or other pay, safety concerns, or other terms and conditions of employment.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act

(a) Within 14 days from the date of the Board's Order, offer Dale Weightman full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Dale Weightman whole for any loss of earnings and other benefits suffered as a result of the discrimination against him in the manner set forth in the remedy section of the decision.

(c) Compensate Dale Weightman for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this order, remove from its files all unlawful documentation of and references to, if any, Dale Weightman's unlawful termination on July 8, 2014; and, within 3 days thereafter, notify him in writing that this has been done and that the documentations and references will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at both its South Central Avenue and North Cave Creek Road (south shop and north shop) Denny's Transmission shops/facilities in Phoenix, Arizona, copies of the attached notice marked "Appendix."[28] Copies of the notice, on forms provided by the Regional Director for Region 28, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, the notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facilities involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since June 6, 2014.

[26] Counsel for the General Counsel requests (Amended Complaint/Tr. 10–13; GC Exh. 1(l)) that the order in this case should include a requirement that Dale Weightman be reimbursed for search-for-work and work-related expenses, without regard to whether interim earnings are in excess of these expenses. Normally, those expenses are considered an offset to interim earnings. But the General Counsel seeks a change in existing rules regarding search-for-work and work-related expenses. This would require a change in Board law, which is solely in the province of the Board and not an administrative law judge. See *Pathmark Stores*, 342 NLRB 378 fn. 1 (2004); *Waco, Inc.*, 273 NLRB 746, 749 fn. 14 (1984) ("it is a judge's duty to apply established Board precedent which the Supreme Court has not reversed," and "for the Board, not the judge, to determine whether precedent should be varied.") (citation omitted).Therefore, I shall not include this remedial proposal in my recommended Order.

[27] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[28] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(g) Within 21 days after service by the Region, file with the Regional Director for Region 28 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. September 10, 2015

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against employees with retaliation for joining with or otherwise supporting other employees in discussing overtime or other pay, safety concerns, or other terms and conditions of employment.

WE WILL NOT make threatening or coercive statements to former employees or current employees telling them that they or other employees could or should have been (or should be) terminated for engaging in protected concerted activity.

WE WILL NOT, in any like or related manner, interfere with, restrain, or coerce employees in the exercise of rights guaranteed by Section 7 of the Act.

WE WILL, within 14 days from the date of this order, offer Dale Weightman full reinstatement to his former position or, if that position no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Dale Weightman whole for any loss of earnings or other benefits suffered as a result of the discrimination against him, with interest.

WE WILL compensate Dale Weightman for the adverse tax consequences, if any, of receiving a lump sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this order, remove from our files all unlawful documentation of or references to, if any, concerning Dale Weightman's discharge on July 8, 2014; and, within 3 days thereafter, notify him that this has been done and that the documentations and the discharge will not be used against him in any way.

M.D.V.L., INC., D/B/A DENNY'S TRANSMISSION SERVICE

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/28-CA-140217 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1015 Half Street, S.E., Washington, D.C. 20570, or by calling (202) 273–1940.